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Attorney for Tokico USA Incorporated

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
:
In re : Chapter 11
:
DELPHI CORPORATION, et al., : Case No. 05-44481 (RDD)
:
Debtors. : (Jointly Administered)
:
-----X

**OBJECTION OF TOKICO (USA), INC.
TO
NOTICE OF ASSUMPTION AND ASSIGNMENT OF CONTRACT**

Tokico (USA), Inc. ("Tokico"), by and through its undersigned attorneys, hereby objects to the assumption and assignment of its contract with Delphi Corporation (the "Debtor") to Beijing West Heavy Industries Co., Ltd. and certain of its affiliates (collectively, the "Buyer"). In support of this objection, Tokico hereby states as follows:

PRELIMINARY STATEMENT

1. Tokico is in receipt of that certain Notice of Assumption and Assignment of Executory Contract Or Unexpired Lease In Connection With Sale of Brakes and Ride Dynamics Businesses, dated May 1, 2009, by which the Debtor seeks to assume and

assign to the Buyer a certain pre-petition purchase order, PO # 550069884 (the “Purchase Order”), which had been entered into between Tokico and the Debtor. A true and accurate copy of the Purchase Order is attached hereto as Exhibit A.

2. The first page of the Purchase Order provides that it expires no later than December 31, 2008. Therefore, the Purchase Order has terminated and no executory contract exists which may be assumed or assigned.

ARGUMENT AND LAW

3. A contract may not be assumed under section 365 if it has already expired according to its terms. Counties Contracting & Const. Co. v. Constitution Life Ins. Co., 855 F.2d 1054, 1061 (3d Cir. 1988) (holding contract could not be assumed where debtor failed to assume contract before it expired 60-days post-petition) citing, In Re Anne Cara Oil Co., 32 B.R. 643 (Bankr.D.Mass.1983); see e.g., In re Pesce Baking Co., Inc., 43 B.R. 949, 957 (Bankr. N.D. Ohio 1984) (holding that collective bargaining agreement that expired by its own terms prior to hearing on motion to reject was no longer executory because “there can be no performance by either party under the terms of the agreement”); In re Spectrum Info. Techs., Inc., 193 B.R. 400, 404 (Bankr.E.D.N.Y.1996) (finding employment agreement no longer executory where debtor discharged employee after petition was filed and prior to motion to reject agreement, as employee “no longer had any material unperformed obligations under the ... [a]greement”); 2 COLLIER ON BANKRUPTCY ¶ 365.04[2] (15th ed. rev. 2009).

4. Once a contract is no longer in existence, the right to assume it is extinguished. Counties Contracting, 855 F.2d at 1061; see also Penn Traffic Co., 524

F.3d at 381-82 (discussing cases where courts have held contracts expiring post-petition are no longer executory).

5. Although the significant date for determining whether a contract is executory is at the time when the petition is filed (In re Riodizio, Inc., 204 B.R. 417, 421 (Bankr.S.D.N.Y.1997)), “events after the filing … may cause the contract to be regarded as not executory when the motion to assume or reject was made, such as contracts which expired post-petition by their own terms after the date of [filing] but before the motion was heard.” In re Child World, 147 B.R. 847, 852 (Bankr.S.D.N.Y.1992).

6. The Purchase Order is not an executory contract because it expired by its own terms on December 31, 2008. Accordingly, the Purchase Order is not capable of being assumed and assigned pursuant to section 365.

WHEREFORE, for the foregoing reasons, Tokico respectfully requests that the Court enter an order denying the Debtor’s request to assume and assign the Purchase Order, and grant such other relief as the Court deems just and proper.

Dated: May 8, 2009

/s/ Paul J. Ricotta
Paul J. Ricotta (PR-6002)
Mintz, Levin, Cohn, Ferris,
Glovsky and Popeo, P.C.
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(617) 542-2241 (fax)

EXHIBIT A

DELPHI

Energy & Chassis Systems

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Buyer:

DELPHI
ENERGY & CHASSIS SYSTEMS
5820 DELPHI DR
TROY MI 48098

Deliver to:

*Please deliver to:
See Delivery Schedule*

TOKICO INC
301 MAYDE DR
BEREA KY 40403

SHIPPING
DELPHI
ENERGY & CHASSIS SYSTEMS
5820 DELPHI DR

Requirements Contract

PO Number
550069884
Version
02/03/2005 15:11:10

Date Issued
02/03/2005

Vendor No: 1001318
DUNS No: 187300876

Payment Terms: ZIM/2	Currency: USD
Payment settled on 2nd, 2nd Month	
Incoterms: FOB - Freight Collect	

GMT 265 Hex-free parts

Item No. Material No.
Description

Plant:

HP01 DELPHI E & C PASS BY SALES

00010 22231526

ELC COMPRESSOR MODULE

Valid From	Valid To	Currency	Price	Price Unit	UOM
01/01/2005	06/30/2005	USD	76,370.00	1,000	PC
07/01/2005	06/30/2006	USD	75,224.45	1,000	PC
07/01/2006	12/31/2008	USD	74,096.08	1,000	PC

This Requirement Contract is for 100% unless otherwise specified.

Notes:

This Contract replaces previous contract # ***

As a supplier to Delphi Energy & Chassis you must use a Delphi

Purchasing Contact: Ranek, Danuta

Contact Address:

DELPHI ENERGY & CHASSIS SYSTEMS
5725 Delphi Drive,
TROY MI 48098-2815

Phone: 248-813-4559

Fax: 248-813-4588

DELPHI

Energy & Chassis Systems

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TOKICO INC
301 MAYDE DR
BEREA KY 40403

Requirements Contract

PO Number
550069884
Version
02/03/2005 15:11:10

Date Issued
02/03/2005

Item No. **Material No.**
Description

Plant

Notes Continued: Approved transportation provider when Delphi is paying the bill. If you require assistance or routing instructions please contact Menlo Worldwide Logistics at 800-805-9433. Failure to follow these instructions could result in a charge back to your company

Delphi requires suppliers of productive material be capable of communicating material forecasts, material schedules, shipping notices and associated information through Electronic Data Interchange (EDI). To insure that EDI communications are accurate and effective, each productive material supplier will be required to become EDI Certified by exhibiting their ability to send and/or receive the appropriate EDI messages in accordance with applicable standards prior to providing productive material. EDI Certification will be conducted and coordinated by the EDI Competency organization.

An Internet electronic form alternative solution is intended to provide relief in situations where establishing an in-house EDI capability is a hardship for a supplier providing limited material.

Please refer to Delphi's website: www.delphi.com then Suppliers/Supplier Community Portal / Supplier Standards, for additional information.

Seller acknowledges and agrees that Buyer's General Terms and Conditions are incorporated in, and a part of, this contract and each purchase order, release, requisition, work order, shipping instruction, specification and other document issued by Buyer or accepted in writing by Buyer, whether expressed in written form or by electronic data interchange, relating to the goods and/or services to be provided by Seller pursuant to this contract (such documents are collectively referred to us this "Contract"). A copy of Buyer's General Terms and Conditions is available upon written request to Buyer or via the internet at Delphi's website, delphi.com. Seller acknowledges and agrees that it has read and understands Buyer's General Terms and Conditions. If Seller accepts this Contract in writing or commences any of the work or services which are the subject of this Contract, Seller will be deemed to have accepted this Contract and Buyer's General Terms and Conditions in their entirety without modification. Any additions to, changes in, modifications of, or revisions of this Contract (including Buyer's General Terms and Conditions) which Seller proposes will be deemed to be rejected by Buyer except to the extent that Buyer expressly agrees to accept any such proposals in writing.

Title to goods shall transfer from seller to buyer upon arrival at buyer's consuming plant.

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CERTIFICATE OF SERVICE

I, Paul J. Ricotta, Esq., hereby certify under penalty of perjury, that on May 8, 2009, I caused a true and correct copy of the Objection of Tokico (USA), Inc. to Notice of Assumption and Assignment of Contract to be served by electronic mail and/or by overnight mail to all persons on the attached Service List.

Dated: May 8, 2009

/s/ Paul J. Ricotta
Paul J. Ricotta

DELPHI MASTER SERVICE LIST
(Overnight Mail)

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5725 Delphi Drive
Troy, MI 48098
ATTN: Legal Staff

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Troy, MI 48098
ATTN: Deputy General Counsel,
Transactional & Restructuring

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Brian Masumoto
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